Sheet Metal Workers Union, Local 216, Sheet Metal Workers' International Association, AFL–CIO *and* Associated Pipe and Fitting Manufacturers *and* Sheet Metal, Heating and Air Conditioning Contractors of Alameda and Contra Costa Counties, Party to the Contract

Sheet Metal Workers Union, Local 216, Sheet Metal Workers' International Association, AFL–CIO *and* National Insulation Manufacturers Association *and* Sheet Metal, Heating and Air Conditioning Contractors of Alameda and Contra Costa Counties, Party to the Contract. Cases 20–CE–49 and 20–CE–51

June 21, 1968

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On December 15, 1967, Trial Examiner David Karasick issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. Answering briefs were also filed by the General Counsel, Associated Pipe and Fitting Manufacturers,[1] and National Insulation Manufacturers Association.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions,[3] and recommendations of the Trial Examiner.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that Respondent, Sheet Metal Workers Union, Local 216, Sheet Metal Workers' International Association, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

[1] The Charging Party in Case 20–CE–49

[2] The Charging Party in Case 20–CE–51

[3] In adopting the Trial Examiner's conclusion that the contract provisions here in issue violate Sec 8(e) of the Act, we do not deem it necessary to pass upon his statements concerning the effect of the passage of time on the legitimacy of a "work recapture object." Compare *Retail Clerks' Union, Local No. 648 (Brentwood Markets, Inc.)*, 171 NLRB No 142

[4] Member Fanning agrees with his colleagues that a finding as to the illegality of the contractual clauses in issue in this proceeding is not barred by Sec 10(b) of the Act In reaching this conclusion, Member Fanning relies only upon the evidence that within the 10(b) period, Respondent and the Contractors entered into a supplemental agreement on November 3, 1966, implementing article VIII, section 3 of the collective-bargaining agreement and a further agreement on November 9, 1966, restricting the use of flexible fiberglass pipe, both of which agreements were designed to further Respondent's illegal objectives

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

DAVID KARASICK, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act (herein called the Act) was heard in San Francisco, California, on May 18, 19, 22, 23, 24, and 25, 1967, pursuant to due notice. The consolidated complaint, dated March 1, 1967, based upon a charge filed on November 2, 1966, in Case 20–CE–49 by Associated Pipe and Fitting Manufacturers and a charge filed on December 12, 1966, in Case 20–CE–51 by National Insulation Manufacturers Association alleges that Sheet Metal Workers Union, Local 216, Sheet Metal Workers' International Association, AFL–CIO (herein called the Respondent), had engaged in unfair labor practices within the meaning of Section 8(e) of the Act.

Upon the entire record[1] in these proceedings, including briefs filed by each of the parties hereto, and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OPERATIONS OF THE EMPLOYERS

Sheet Metal, Heating and Air Conditioning Contractors of Alameda and Contra Costa Counties, a California corporation, with its office and place of business located in Oakland, California, is an association of 56 employers, of whom 43 are directly involved in these cases, who are engaged as contractors in the heating and air-conditioning industry in the San Francisco Bay area. The association and its 43 employer-members involved in these proceedings are herein collectively called the Contractors.[2] The Contractors, as an association, exists

[1] The unopposed posthearing motion of the General Counsel to correct the transcript of the hearing conforms to my recollection of the testimony and is granted Errors in the transcript have been noted and corrected

[2] Also referred to in the record as SMACK-ACK

for the purpose, among other things, of representing its employer-members in collective bargaining, and participating in the negotiation, execution, and administration of collective-bargaining agreements. The employer-members of the Contractors, in the course and conduct of their business operations, annually purchase and receive goods and merchandise valued in excess of $50,000 directly from suppliers located outside the State of California and annually purchase and receive goods and merchandise valued in excess of $50,000 from suppliers located within the State of California, which suppliers receive said goods and merchandise directly from suppliers located outside the State of California. The Contractors and its employer-members at all times material herein have constituted an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES ALLEGED

A. *The Issue*

The principle issue in this case is whether the Respondent entered into, maintained, and gave effect to agreements with the Contractors which violated the provisions of Section 8(e) of the Act.

B. *The Facts*

The parties involved in these proceedings are the Contractors; the Respondent; Associated Pipe and Fitting Manufacturers (herein called Associated Pipe); and National Insulation Manufacturers Association (herein called NIMA).

The Contractors has been in existence for approximately 30 years. Of its 56 employer-members, 43 are engaged in the installation of heating, ventilating, and air-conditioning equipment. The work practices of these 43 firms are primarily involved in these cases. Of the 13 remaining employer-members of the Contractors, 10 of the firms which do wholly industrial work and 3 of which are engaged in manufacturing or fabrication and installation of speciality items are not, by virture of the nature of their operations, involved in the dispute with the Respondent which gave rise to these proceedings.

The Respondent is a construction local of the Sheet Metal Workers' International Association. The International grants charters to various kinds of locals of which construction workers and production workers are the most common. Employers in construction locals fabricate and install sheet metal materials on construction jobs. Employees in production locals are engaged in mass production manufacturing of sheet metal products. For the past 30 years, the Contractors and the Respondent have been parties to successive collective-bargaining agreements.

Associated Pipe is an association consisting of 11 members located on the West Coast who are engaged in the manufacture of sheet metal products, including furnace pipe and fittings, for the residential and commercial building industry. For approximately 20 years, members of Associated Pipe have sold their products, including round sheet metal pipe and fittings, to members of the Contractors. Sales are made through catalogues which are prepared and furnished by members of Associated Pipe. Of the four members of Associated Pipe located in the Bay area,[3] three have had collective-bargaining agreements with Local 355 of the Sheet Metal Workers' International Union, a production workers' local, for periods varying from 12 to 21 years. The record does not show whether the fourth member of Associated Pipe which is located in the Bay area is likewise party to a collective-bargaining agreement either with Local 355 or any other union. Associated Pipe does not carry on collective bargaining on behalf of its members. Instead, individual members negotiate separate contracts with either Local 355 or such other unions as may represent their production employees. The hourly wage rate for production sheet metal workers provided for in the contract between Local 355 and members of Associated Pipe is substantially less than the hourly pay provided for in the contract between the Respondent and the Contractors.

NIMA is composed of nine employers of whom four[4] manufacture fiberglass products which are used as substitutes for sheet metal material. These fiberglass products are sold either directly or through distributors to members of the Contractors. Fiberglass in a form to be used as a substitute for sheet metal fiberglass duct is a relatively new product. Round fiberglass duct material was first purchased by a member of the Contractors in 1957. Since that time, various members of the Contractors have at times purchased such materials.[5] The manufacturers who are members of NIMA are parties to collective-bargaining agreements with the Glass Bottle Blowers Union.

As noted above, the Contractors and the Respondent have negotiated collective-bargaining contracts for approximately 30 years. On July 1, 1965, the Respondent and the Contractors entered into a collective-bargaining agreement, entitled "Standard Form of Union Agreement, Sheet Metal, Roofing,

[3] These are Wellmade Metal Products, Noll Manufacturing, Call Manufacturing, and William Wallace Manufacturing

[4] Pittsburgh Plate Glass, Gustin-Bacon, Johns-Manville, and Owens-Corning

[5] In 1966, the sales of fiberglass duct materials in the Oakland East Bay area in which the employer-members of the Contractors operate amounted to $400,000.

Ventilating, and Air Conditioning Contracting Divisions of the Construction Industry," hereinafter sometimes referred to as the SFUA. This contract by its terms expires on June 30, 1968. On May 5, 1965, prior to the execution of the agreement, the Respondent sent the following letter to the Contractors:

> TO ALL SHEET METAL CONTRACTORS SIGNATORY
> TO STANDARD FORM OF UNION AGREEMENT
> Gentlemen:
>
> Be advised that it is a violation of the Standard Form of Union Agreement and a loss of work to the mechanics who are members of the Sheet Metal Workers' Union, Local 216 when any contractor signatory to the above agreement purchases material manufactured at wages less than he has agreed to pay for the installation of this material in a commercial or industrial job.
>
> Production made pipe and fittings (with the exception of plenum chambers) may be purchased from production shops only when the material is to be installed in residential construction. ALL MATERIAL MUST BEAR THE SHEET METAL WORKERS' UNION LABEL.

The contract thereafter executed by the Respondent and the Contractors on July 1, 1965, contained, among other matters, a union-shop clause as well as the following provisions:

ARTICLE I

SECTION 1

This Agreement covers the rates of pay, rules and working conditions of all employees of the Employer engaged in the manufacture, fabrication, assembly, handling, erection, installation, dismantling, reconditioning, adjustment, alteration, reparing, and servicing of all ferrous or nonferrous sheet metal work of No. 10 U.S. gauge or its equivalent or lighter gauge, and all other materials used in lieu thereof, all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches and all other work included in the jurisdictional claims of Sheet Metal Workers International Association.

ARTICLE II

SECTION 2

Subject to other applicable provisions of this agreement, the Employer agrees that when subcontracting for prefabrication of materials covered herein, such prefabrication shall be subcontracted to fabricators who pay their employees engaged in such fabrication not less than the prevailing wage for comparable sheet metal fabrication as established under agreements between this union or other local affiliates of Sheet Metal Workers' International Association and sheet metal fabricators.

ARTICLE VIII

SECTION 2

On all work specified in Article I of this Agreement, fabricated and/or assembled within the jurisdiction of this Union, or elsewhere, for erection and/or installation within the jurisdiction of any other Local Union affiliated with Sheet Metal Workers' International Association, whose established wage scale is higher than the wage scale specified in this Agreement, the higher wage scale of the job site Union shall be paid to the journeymen employed on such work in the home shop or sent to the job site.

SECTION 3

The provisions of Section 2 of this Article shall not apply to the manufacture for sale to the trade of the following items:

1. High pressure pipe and fittings (local building and construction wage rates)
2. Ventilators (production wage rates)
3. Louvers (production wage rates)
4. Automatic dampers (production wage rates)
5. Radiator and air conditioning unit enclosures (production wage rates)
6. Residential furnace pipe and fittings (production wage rates)
7. Mixing (attenuation) boxes (production wage rates)
8. Plastic skylights (production wage rates)

9. Kitchen equipment (industrial rates)[6]

The provisions of article VIII, section 3, had not constituted part of any prior agreement between the parties.

On March 9, 1966,[7] the Respondent filed grievances against two of the employer-members of the Contractors for violations of article II, section 2, and article VIII, section 2 and 3, of the contract and on March 10 filed an identical grievance against a third employer-member of the Contractors.[8]

On April 21, the local joint grievance board, provided for under the terms of the SFUA, met to consider the grievances. It could not render a decision because its members were equally divided in their views as to whether or not the contractors in question had violated the terms of the contract. Because of this, the grievances were presented to a panel, also provided for under the terms of the contract, which consisted of representatives of Sheet Metal Workers' International Union and Sheet Metal and Air Conditioning Contractors' National Association. On September 30, the matters were presented to that panel which found that "Article II, Section 2 and/or Article VIII, Section 3, of the contract, had been violated by the contractors involved." The panel also ordered the Contractors and the Respondent to "work out guide lines for conforming to the contract which both parties had signed and agreed to work by."

On November 1, the joint grievance committee composed of representatives of the Respondent and of the Contractors again met for the purpose of reaching an agreement whereby "the use of material, not fabricated at building trades rates, on commercial and industrial work"[9] would be discontinued.

On November 3, the Contractors and the Respondent executed the following agreement relating to article VIII, section 3, of the contract:

PIPE AND FITTINGS

All pipe and fittings installed on other than residential installations (see attached definition) shall be manufactured by employees receiving no less than the construction wage rate recognized in the Alameda and Contra Costa Counties.

EXCEPTION: The use of round pipe of a material other than metal shall be acceptable under the following conditions: Where the owner or his representative (architect, etc.) specifies the use of round pipe other than metal, said pipe may be installed when no addenda is issued at least five (5) days prior to the bid date by the owner or his representative which would authorize use of a substitute material.

Contractors must immediately inform the Association of all specifications requiring use of round pipe other than metal so that an effort may be made to provide for the use of other products.

RESTRICTED USE of flexible connections will be acceptable under terms of an agreement presently under discussion. Said agreement will be available and mailed on or about November 15, 1966.

Also available at that time will be a definitive clarification pertaining to the various items covered under this section of your agreement.

A list of all contracts, on which bona fide blueprints have been issued which include use of any of the items referred to in this communication and signed prior to January 1, 1967, MUST be provided to both the Association and the Union. If this information is not provided, the contractor installing subject material on or after January 1, 1967, shall be deemed in violation of the agreement irrespective of the date said contract was signed.

In an effort to protect your previously submitted bid and cost estimate figures and to afford sufficient time to deplete present inventories of subject materials, said materials may be used on any work performed prior to January

[6] The foregoing items, all of which are used at various times by employer-members of the Contractors while engaged in the installation of heating, ventilating, and air-conditioning systems, are described in the record as follows:

(1) *High-pressure pipe and fittings* are used in high-pressure systems (defined as being able to support a water column 6 inches or higher) Such pipe and fittings are heavier than normal gauge, are required to be air tight and are usually spiral in form

(2) *Ventilators* are outlets through which air is delivered to a room

(3) *Louvers* are enclosures, usually water tight, in a wall opening to permit passage of air

(4) *Automatic dampers* balance the flow of air in an air conditioning system

(5) *Radiator and air conditioning unit enclosures* are the outer cabinets or casings which conceal the mechanical portions of the radiator or air conditioning unit

(6) *Furnace pipe and fittings*, also referred to as round pipe and fittings, carry air in an air conditioning or heating system

(7) *Mixing (attenuation) boxes* reduce the intensity of the sound of air entering a room

(8) *Plastic skylights* are skylighting in which plastic bubbles have been inserted

(9) *Kitchen equipment* is regarded as residential or commercial in nature and consists of hood, fans, lights, vents, stainless steel sinks, refrigerators, ranges, and similar items

(10) *Round fiberglass pipe*, which has high insulation and sound proof qualities, is on occasion used as a substitute for round sheet metal pipe In flexible form, it is also known as "wiggly-worm "

[7] All dates hereafter refer to 1966 unless otherwise indicated

[8] The three employer-members of the Contractors against whom the grievances in question were filed were Hayward Heating and Sheet Metal, Inc Walnut Creek Sheet Metal and Furnace Company, Inc , and A R Peterson & Sons The grievances alleged that the contractors in question had installed fiberglass pipe, galvanized "elbows" and flexible tubing, not fabricated at building trades rate of pay, in two schools and an office building

[9] Residental refers to either single or multiple homes, commercial to apartment houses and office and commercial buildings, and industrial to factories and plants

1, 1967, and on any work CONTRACTED FOR prior to that date.

Following a further meeting between the Respondent and the Contractors on November 9 for the purpose of resolving the problem of the use of flexible fiberglass pipe, the parties agreed to certain restrictions then in effect in a contract of a sister local of the Respondent in New York, with the modification that flexible fiberglass duct could be used between the main trunk line and a light troffer-diffuser for a maximum of 5 feet rather than 18 inches.[10]

On December 20, the Contractors issued a "final reminder" to its employer-members that the restrictions which had been agreed upon regarding the use of round sheet metal pipe and fittings and fiberglass flexible connections would go into effect on January 1, 1967. Gardner Morse, executive manager of the Contractors, instructed several employer-members who called him regarding the notice which had been sent out on December 20 that continued purchase of round pipe and fittings at less than the construction wage rate would be regarded as a violation of the terms of the contract.

On February 23, 1967, the Respondent sent the following letter to the Contractors:

> TO ALL CONTRACTORS SIGNATORY TO STANDARD FORM OF UNION AGREEMENT WITH SHEET METAL WORKERS, UNION, LOCAL 216
>
> Gentlemen:
>
> Be advised that Article VIII and all its subdivisions are still a part of the Standard Form of Union Agreement signed by all companies with Sheet Metal Workers' Union, Local 216 and enforceable.
> All rumors to the effect that some company has won a decision against this Union is [sic] absolutely without any truth and is [sic] just a malicious rumor.
>
> Any violations will be processed in the usual manner and damages assessed.
>
> Very truly yours,
>
> SHEET METAL WORKERS' UNION, LOCAL #216
>
> /s/ Elias L. Arellano, Business Manager

C. *Summary and Concluding Findings*

By virtue of the contract clauses contained in article II, section 2, and article VIII, sections 2 and 3, of the SFUA entered into by the parties on July 1, 1965, the Employers agreed that when they subcontracted the prefabrication of, or when they purchased, products of sheet metal or substitute materials, the subcontract or the purchase would be limited to the products of fabricators or manufacturers who paid their employees engaged in such fabrication or production not less than the prevailing wage for comparable sheet metal fabrication or production as established under agreements made between the Respondent or other local unions affiliated with the parent International and employers engaged in sheet metal fabrication.[11]

Section 3 of article VIII provides, however, that the employer-members of the Contractors may purchase certain products "manufactured for sale to the trade" where the employees who produce such items are paid not less than: (1) the sheet metal production employees' union wage rates to employees engaged in the manufacture of ventilators, louvers, automatic dampers, radiator and air-conditioning unit enclousers, residential furnace (round) pipe and fittings, mixing (attenuation) boxes, and plastic skylights; (2) the local sheet metal employees' building and construction union wage rates to employees engaged in the manufacture of high pressure pipe and fittings; and (3) the industrial sheet metal employees' union wage rates to employees engaged in the manufacture of kitchen equipment.

In addition, by the supplemental agreement of November 3, 1966, entitled "Pipe and Fittings" and the further agreement executed shortly thereafter regarding the use of flexible connections, the em-

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[10] A diffuser is an outlet through which air is distributed into a room and a light troffer-diffuser is a device which provides for distribution of air into a room through a light fixture. The Contractors originally requested that flexible fiberglass duct be permitted for a maximum of 5 feet between a main trunk line and any diffuser but the parties finally agreed this maximum would be permitted only to a light troffer-diffuser

[11] Art. II, sec. 2, of the contract provides that employees engaged in the "fabrication" of materials covered by the contract shall be paid "not less than the prevailing wage for comparable sheet metal fabrication as established under agreements in this union or other local affiliates." This provision might be construed as applying to Local 355, a sister local of the Respondent, whose members are engaged in the manufacture of round pipe and fittings and who receive a "production" wage rate which is approximately $2 per hour less than the "construction" wage rate set forth in the contract of the Respondent. A reading of the contract, however, convinces me that "fabrication" as used in art. II, sec. 2, and art. VIII, sec. 2, of the contract is to be distinguished from "manufacture" as used in art. VIII, sec. 3, of the contract in the general sense that "fabrication" refers to making the items in question in the individual sheet metal shops of the employer-members of the Contractors as contrasted with the making of similar items on a mass scale in a repetitive process commonly associated with a factory. Thus, the items produced by members of Local 355 would be regarded as "manufactured" while those made by members of the Respondent would be regarded as "fabricated."

ployer-members of the Contractors agreed with the Respondent: (1) to purchase pipe and fittings to be installed on commercial and industrial construction only from those manufacturers of such pipe and fittings who pay their production employees no less than the construction wage rate of the Respondent; (2) to purchase and use round pipe made of fiberglass or material other than metal only where the owner or his representative, such as his architect, specifically so directs and does not authorize the use of a substitute material; and (3) to purchase and use flexible hose and connections, such as flexible fiberglass duct, only where the maximum length does not exceed 18 inches for the connection from an outlet to a diffuser or does not exceed 5 feet for the connection from an outlet to a light troffer-diffuser. The supplemental agreement of November 3 granted a period of grace for its application. It provided that on commercial and industrial construction jobs which were contracted for or performed before January 1, 1967, the employer-members of the Contractors could use or install round pipe and flexible connections which were manufactured by employees who had not received the sheet metal construction wage rate. This clause was inserted for the purpose of permitting the employers sufficient time to deplete their existing inventories of such materials and to protect their cost estimates and bids previously submitted on construction jobs.

The Respondent argues that, of the nine items listed in section 3 of article VIII, only round pipe and fittings[12] are at issue in these proceedings. It advances this contention on the ground that it has never taken any position with respect to the use or purchase of any of the other eight items listed and therefore consideration of those items is barred by the provisions of Section 10(b) of the statute because no act on the part of either party with respect to such items occurred within 6 months prior to the time charges were filed.

The charges in these proceedings were filed on November 2 and December 12, 1966. Contrary to the Respondent's contention, the record shows that within a 6-month period prior to both such dates the Respondent did take action designed to enforce its interpretation of the contractual clauses in question. Thus, both the panel meeting on September 30, pursuant to the grievance provisions of the contract, and the meeting of the parties on November 1, when they agreed to settle on a date for requiring strict compliance to the contract's terms, were a direct result of action taken by the Respondent in pressing its claim that three of the employer-members of the Contractors had violated article II, section 2, and article VIII, sections 2 and 3. Thereafter, the Respondent continued to press its claim by insisting upon supplemental agreement regarding pipe and fittings which was executed by the parties on November 3 and the further agreement shortly thereafter governing the use of flexible connections.

These acts of continued enforcement of the contract within the 6-month period preceding the filing of charges constituted a new "entering into" the agreement within the meaning of Section 8(e) of the Act, despite the fact that the contract was initially executed before the 6-month period of limitations had begun.[13]

Moreover, on February 23, 1967, the Respondent sent a letter to all employer-members of the Contractors which stated that article VIII and "all its subdivisions"[14] were still a part of the contract and were "enforceable." This surely showed no intention on the part of the Respondent to limit the application of article VIII, section 3, solely to round pipe and fittings. For the foregoing reasons, I find that all of the items listed in article VIII, section 3, of the contract, and not round pipe and fittings alone,[15] fall within the issues raised in these proceedings.

The General Counsel and the Charging Parties contend, and the Respondent denies, that the foregoing provisions of the SFUA and the supplemental provisions above referred to violate Section 8(e) of the Act.

Whether or not they do is to be determined by the object of the clauses in question. In this instance, as is generally true in cases in which this section of the Act is involved, "the distinction to be drawn as best one can is between an object and a consequence."[16] If the contractual provisions in question had as their object the preservation or protection of work traditionally and customarily

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[12] Also referred to in the record as "furnace pipe and fittings."

[13] *Dan McKinney Co.*, 137 NLRB 649, *District No. 9, International Association of Machinists, AFL–CIO, et al.*, 134 NLRB 1354, 1360, enfd. 315 F.2d 33 (C.A.D.C.), *Hillbro Newspaper Printing Company*, 135 NLRB 1132, enfd. *sub nom. Los Angeles Mailers Union No. 9, International Typographical Union, AFL–CIO* v. *N.L.R.B.*, 311 F.2d 121 (C.A.D.C.). To the extent that the decision in *N.L.R.B.* v. *Local 28, Sheet Metal Workers'*, 380 F.2d 827 (C.A. 2), represents a departure from these cases, I am constrained to follow the view of the Board until such time as the United States Supreme Court rules to the contrary. *Iowa Beef Packers, Inc.*, 144 NLRB 615, and cases therein cited.

[14] I cannot regard this as a "tenuous reference" as the Respondent characterizes it in its brief.

[15] The Respondent contends that there is a difference between round pipe and fittings used on residential, as distinguished from commercial, construction. Elias Arellano, the Respondent's business manager, testified that round pipe for residential use was generally tin coated and approximately of 30 gauge, though "in air conditioning they might use 20 gauge galvanized" while commercial round pipe is always galvanized, aluminum or copper, ranging from 20 to 26 gauge. The president of Associated Pipe, however, testified that there is no difference between round pipe and fittings used on residential and on commercial work. His testimony in this respect was corroborated by two of the employer-members of the Contractors who are regularly engaged in installing such pipe in both residential and commercial jobs. I am of the belief that their testimony is more accurate than that of Arellano in this regard and find, in accordance with their testimony, that there is no difference between residential and commercial use of round pipe and fittings.

[16] *Houston Insulation Contractors Association* v. *N.L.R.B.*, 357 F.2d 182, 187 (C.A. 5), reversed in part on other grounds 386 U.S. 664; *Syracuse Supply Company*, 139 NLRB 778, 781.

performed by employees in the bargaining unit, as the Respondent contends, they may be held harmless; but if instead they were designed to accomplish other union objectives, as the General Counsel and the Charging Parties assert, they are proscribed by the provisions of Section 8(e).[17] The evidence shows that the employer-members of the Contractors normally and regularly purchased from mass production manufacturers,[18] a majority of all but one of the items listed in article VIII, section 3, except in those situations where an emergency existed and the contractor could not wait for delivery; or where a special shape or special materials (such as copper, brass, or stainless steel) were required and the items were therefore not available from a manufacturer; or on those occasions when work in the individual sheet metal shops was slack and the employer wished to keep his employees at work instead of sending them home.[19] The one item to which this did not apply was commerical-type kitchen equipment which was fabricated in the shops of a majority of the employers in the unit.[20]

It is undoubetdly true, as the Respondent urges, that its members can, and sometimes have, fabricated sheet metal round pipe and fittings as well as some of the other items listed in article VIII, section 3. But I do not regard this as significant. What is relevant in this connection is whether the employees in the unit customarily and traditionally have fabricated such items. And I would think that "customary" and "traditional" in this sense must be taken to mean that the employers in the common course of their business regularly assign such tasks to their employees, and that when such items are used they are generally, or for the most part, fabricated by such employees. That is not the situation in this case, however. Instead the record shows that a vast majority of the items in question were purchased by the employer-members of the Contractors as catalogue items supplied by manufacturing concerns, and the unit employees fabricated such items only on occasions when an emergency or other unusual work condition existed. Under such circumstances, I cannot consider the fabrication of these items to be fairly claimable unit work. While the Respondent may argue that its members once performed this work and therefore are entitled to recapture it, I cannot regard such an object to be a legitimate one in view of a history of 20 years or more during which the employers have fol-

[17] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612.

[18] Scott Company fabricates high-pressure pipe (one of the nine items listed in art. VIII, sec. 3) on a machine which it acquired 3 years ago. In addition, it has sold undisclosed quantities of such pipe to other sheet metal contractors in the area, apparently since the dispute in these cases arose. It is the only employer among the 43 involved which is engaged in such fabrication. Of the ramaining 42, 29 have never used high-pressure pipe and of the remaining 13, 11 purchase 80 percent or more of this item when used and 2 purchase 40 percent and 50 percent, respectively. In light of these facts, I do not believe that the isolated instance of Scott's operations in this respect, even though it apparently is the largest of the contractors here involved, is sufficient to show that the prevailing practice in the unit is to fabricate this item rather than to purchase it.

[19] Evidence of the extent to which the employer-members of the Contractors fabricated or purchased the items in question consisted of a chart which has been prepared by Gardner Morse, the executive manager of the Contractors, who testified that he had prepared such chart on the basis of information which he had personally secured from each of the 43 employer-members involved. On the fourth day of the hearing, after the General Counsel had called five of the employers listed on the chart who testified that the information set forth therein with respect to their operations was substantially correct, he represented that he had communicated with the remaining employers listed and was prepared to present their testimony which would be substantially to the same effect, with the exception of six employers whom he had been unable to reach and nine as to whom the percentages shown regarding one or more items on the chart were to be corrected. I ruled that further testimony along the same line would be cumulative, would consume an undue amount of time, and would unduly prolong the hearing. I therefore admitted the document in evidence over the objection of the Respondent as to its hearsay character. The ruling so made was in the exercise of my discretion, in accordance with the provisions of Sec. 10(b) of the Act, that proceedings involving unfair labor practices shall be conducted "so far as practicable . . in accordance with the rules of evidence applicable in the district courts of the United States." The considerations which led me to that conclusion in addition to those heretofore stated were that the issue, namely, whether the employees in the unit did the type of work in question was a simple one; that the evidence was not perculiarly within the confines of the employers alone but was equally available to the Respondent since the latter's members were employees in the shops in question, and its business agents patrolled the contract and sought to enforce, that the same chart in question had been placed in evidence in proceedings under Sec 10(1) of the Act preceding the present hearing and the Respondent thus had an additional opportunity to check the accuracy of the documents, and that the General Counsel had stated his willingness to make available to the Respondent, without resort to the subpena process, all remaining employers as witnesses if the Respondent wished to call them to further test the accuracy of the document In coming to the conclusion that the document should be received in evidence, I also gave recognition to the fact that the General Counsel, in rechecking with the employers named in the exhibit, had found nine instances in which errors had been made with respect to one or more items and had been unable to reach six of the employers I was of the opinion then, as I am now, that the purchasing practices of nine of the employers as to whom the information was incorrect would not substantially change the conclusions to be drawn from the document as a whole since I did not consider these errors collectively to constitute such a significant departure from the information contained in the document as to provide a basis for seriously questioning its accuracy. After the document had been admitted, the Respondent called seven additional employers whose names appeared in the exhibit and they too testified that the information contained in the document concerning their purchases was substantially correct. The extent of the items purchased, as shown in percentages in the exhibit, was based upon each employer's personal knowledge of his operations since business records normally maintained did not contain such data. It did not appear that any other feasible method of securing such information existed. Under these circumstances, the employer in each instance might appropriately be regarded as in a position equivalent to that of an expert witness. The Respondent, in its brief, reiterates its view that the document was erroneously received in evidence. After analyzing the entire record, I am led to the same conclusion which I originally reached. Accordingly, I reaffirm the ruling made at the hearing regarding the admissibility of the document in question. *N.L.R.B.* v. *Cantrall*, 201 F.2d 853 (C.A 9); *N L R.B.* v. *W B Jones Lumber Company*, 245 F.2d 388 (C A. 9); *U S.* v. *Mortimer*, 118 F.2d 266 (C.A. 2), *The Great Atlantic and Pacific Tea Company*, 81 NLRB 1052, fn. 1. Nor in this connection am I convinced that the conclusions to be drawn from the document are overcome by the testimony of Elias Arellano, business manager of the Respondent, that, in visits he has made to 29 of the shops during the past several years, he has observed some round pipe and fittings being fabricated.

[20] Of the 43 employers involved, the evidence shows that 24 fabricated from 85 percent of 99 percent of the commercial kitchen equipment which they installed, 6 fabricated 50 percent or less; and 13 never installed such equipment. Concessions made by the General Counsel as to certain errors appearing in the chart upon which he relied to show the "buy-out" practices of the employers as to this and other items listed in art. VIII, sec. 3, of the contract would not substantially change these figures

lowed a consistent and regular pattern of purchasing such items rather than fabricating them themselves. Whatever conditions may dictate the justification of a work recapture object, I do not believe that it validly may reach back over so long a period of years and in contravention of so well established a practice as has been shown to exist in this case.[21]

From the foregoing evidence, it may be concluded that the work which was subject to the contractual provisions in question was not customarily and traditionally performed by the employees of the Contractors and, therefore, that the object of the restrictions so imposed was not the preservation of unit work.

This conclusion is reinforced upon consideration of the factors suggested by the Supreme Court in its recent decision in the *National Woodwork* case[22] in which it stated the necessity of examining all the surrounding circumstances in order to determine whether contractual restrictions, such as those involved in these proceedings, violate the provisions of Section 8(e). The Court in that case stated that ". . . such circumstances might include the remoteness of the threat of displacement by the banned product of services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry."

In turning to an examination of the first of these factors, the record shows that the threat of displacement is indeed remote. The items in question have not been produced for many years by the employees of the contractors here involved, other than in exceptional circumstances. In addition, employment of the members of the Respondent by the employer-members of the Contractors has increased substantially over the past 10 years.

Nor does an examination of the history of labor relations of the Respondent and the employers who would be boycotted lend support to the view that the Respondent was acting in the interest of preserving unit work for its members, since none of them are employees of firms which belong to Associated Pipe. The Respondent did represent the employees of some of those firms prior to 1955 but since that date these employees have been, and are now, represented by Local 355.[23] The provisions of the contract, to the extent they require payment of construction wage rates for the manufacture of commercial round pipe and fittings are designed to control the employment practices of member firms of Associated Pipe whose employees are not a part of the unit.

Finally, an examination of the economic factors involved points to a similar determination. Of the nine items listed in article VIII, section 3, the contract permits seven of them to be subcontracted or purchased from manufacturers at the production rate of pay which is lower than the construction rate received by the employees of the Contractors. Thus, as to these seven items, the Contractors have no economic incentive to have this work done by members of the Respondent who are their employees.

It is apparent from the record that the item used in greatest volume and with greatest frequency is round pipe and fittings. While the contract permits the subcontracting or the purchase of this item from the manufacturer at production wage rates for residential use, the record shows that most of the employer-members of the Contractors regularly purchased round pipe and fittings for commercial use as well and it is as to this latter use that the controversy in these proceedings is mainly directed.[24]

The employer-mmembers of the Contractors can purchase sheet metal pipe produced by manufacturers at one-third to one-half the cost of fabricating such pipe in their shops. And it would cost them 5 to 10 times as much to custom make fittings for sheet metal pipe as compared to purchasing such fittings from manufacturers. In addition, the undenied evidence shows that the cost of machinery and equipment required for the production of complete fabrication of round metal pipe and fittings would exceed $50,000, a figure beyond the financial capabilities of the smaller employer-members of the Contractors.[25] From this, it would appear that the restrictions imposed were for a purpose beyond benefiting the Respondent's members who were covered by the SFUA.

It is thus apparent that, with the possible exception of commercial kitchen equipment, none of the articles in question are unit work or fairly claimable as unit work. As above noted, the contractual clauses in question dictate the wage rates paid by members of Associated Pipe whose employees are not represented by the Respondent and are not part of the collective-bargaining unit here under consideration. Such an object is clearly proscribed by Section 8(e) of the Act. But the record shows that this was not the sole object of the Respondent. In this respect, Elias Arellano, business manager of the Respondent, testified that the reason for the restrictive provisions of article VIII, section 3, was: "To create a standard for the sheet metal profession in the whole United States and Canada." He

[21] Cf. *Meat and Highway Drivers [Wilson & Co.]* v. *N.L.R.B.*, 335 F 2d 709 (C A.D.C), where practically all of the changes of location on the part of the employers, which led to the changes in assignment of the unit work, occurred within the period of the expiring contract

[22] *National Woodwork Manufacturers Association* v. *N.L.R.B* , 386 U S 612.

[23] Local 355 represents the employees of three of the four member firms of Associated Pipe operating in the San Francisco Bay area The record is silent as to what union, if any, represents the employees of the fourth firm

[24] Round pipe and fittings for commercial and residential use are of standard gauges, sizes, and shapes and are mass produced Round pipe and fittings for industrial use are designed to convey exhaust materials, dust, and chemicals, as well as air, and therefore require special sizes and shapes and heavier gauges They are generally custom made in the shops of the contractors and their use is not in issue here

[25] As noted above, most of the contractors operate small business enterprises. A majority of them employ 10 men or less

fu. ıer testified that one of the purposes was to benefit sister construction locals throughout the United States and Canada. Each of these admitted purposes demonstrates an object to benefit union members generally. They are "tactically calculated to satisfy union objectives elsewhere," and are not "addressed to the labor relations of the contracting employer vis-a-vis his own employees" which the Supreme Court has said is "the touchstone" in determining their validity.[26]

Commercial kitchen equipment, as noted above, might well be regarded as unit work and, as such, subject to restrictions imposed on its use by the Respondent for the purpose of preserving such work for its members. But there is no evidence that the Respondent's purposes in imposing demands regarding the use of this item were in any way different from those regarding the remaining items listed in article VIII, section 3. Nor is there anything in the record to show that the Respondent had a different object in pressing its claim as to commercial kitchen equipment. It is, therefore, reasonable to conclude that the objects for including this item in article VIII, section 3, were the same as those which impelled the Respondent to include the other items referred to in that article and section. And the fact that still another and primary object may also exist insofar as commercial kitchen equipment is concerned is irrelevant.[27]

What has just been said regarding the sheet metal products in question applies with even greater force to rigid and flexible fiberglass duct or pipe. The employees of the Contractors have never fabricated such articles. Instead, the Contractors have always purchased them from manufacturers. The record shows that the Contractors do not have either the knowledge or the physiclal or financial resources required for their manufacture.[28]

Upon this state of facts, there is no justification for the assertion that the making of these products is work which the employees in the unit have done[29] or may fairly claim. Nor does the evidence support the Respondent's contention, raised in its brief, that the contract's ban on the purchase of round pipe and fittings made at less than the Respondent's rate of pay constitutes a valid wage standard clause.[30] The restrictions on the use of rigid round fiberglass to those instances where the owner or architect expressly specified the product and could not successfully be induced to agree to the use of sheet metal and the further restrictions on the use of flexible round fiberglass to a maximum length of 5 feet between an outlet and a light troffer-diffuser and 18 inches between an outlet and an ordinary diffuser virtually ruled out the use of such material by the contractors because of the undue burden placed upon them in the first instance and by the economic waste entailed in the second. Flexible duct normally is available in 6 and 7 foot lengths. Some brands of the product unravel when cut, but, beyond that, cutting them to 5 foot lengths would be wasteful. In addition, the advantage of using flexible round fiberglass lies in the flexibility it possesses. But that flexibility is lost in lengths less than 18 inches. These restrictions severely encumber and diminish the business relations of the contractors and NIMA. If the contractors did not use fiberglass round pipe in either rigid or flexible form, they would of necessity have to use such pipe constructed of sheet metal. It is thus obvious that the restrictions placed upon the use of fiberglass duct were intended to implement the restrictions imposed upon pipe constructed of sheet metal and the Respondent's objects as to the latter were intended to, and did, apply equally to the former.

Upon the foregoing facts and upon the record as a whole, I find that the contractual clauses in question were designed, not to perserve the working conditions of employees in the unit, but to control the employment practices of member firms of Associated Pipe who would do business with the Contractors and to aid and assist union members generally, and are therefore in contravention of Section 8(e). I further find that the Respondent violated Section 8(e) of the Act by entering into, within the meaning of that section, article II, section 2, and article VIII, sections 2 and 3, of the SFUA by its conduct on and after September 30, 1966, in seeking to enforce those clauses and by its further conduct entering into and seeking to enforce the supplemental agreement of November 3, 1966, entitled "Pipe and Fittings" and the agreement executed shortly thereafter governing the use of flexible connections.

IV. THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, as set forth above, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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[26] *National Woodwork Manufacturers Association* v *N L R B*, 386 U.S 612

[27] "Once the conduct has as 'an object' the prohibited secondary effect, it makes no difference that there are other objectives present, be they primary or otherwise" *N L.R.B* v *New York Lithographers*, 385 F 2d 551 (C A. 2)

[28] Most of the contractors here involved operate relatively small businesses, the average sized shop employing approximately 6 to 10 men and fabricating sheet metal pipe limited in length to a maximum of 3 feet, which is produced for the most part on manually operated equipment The manufacture of fiberglass, on the other hand, requires a minimum capital expenditure of $7,500,000 and skills of a different kind from those possessed by the employees of the Contractors Employees of four of the major producers of fiberglass are members of the Glass Bottle Blowers Union

[29] This refers to rigid and flexible round fiberglass duct as distinguished from rectangular fiberglass duct. The latter is fabricated by employees of the Contractors from sheets which are manufactured by members of NIMA and is not a matter in dispute in these cases

[30] Arellano admitted that he did not know whether the employees engaged in the manufacture of fiberglass pipe received wages comparable to the construction wage rates of the Respondent

Upon the basis of the foregoing findings of fact, and upon the entire record in these cases, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is, and has been at all times material to the issues in these proceedings, a labor organization within the meaning of Section 2(5) of the Act.

2. The Contractors and the employers who are its members, and each of them, are employers within the meaning of Section 2(2) of the Act and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By maintaining, enforcing, and giving effect to article II, section 2, and article VIII, sections 2 and 3, of the contract entered into by the Respondent with the Contractors on behalf of its employer-members, on or about July 1, 1965, entitled "Standard Form of Union Agreement, Sheet Metal, Roofing, Ventilating, and Air Conditioning Contracting Divisions of the Construction Industry," and the supplemental agreements entered into on or about November 3, 1966, entitled "Pipe and Fittings," and shortly thereafter regarding the use of flexible connections, the Respondent entered into agreements in violation of Section 8(e) of the Act, insofar as said agreements require the employer-members of the Contractors: (1) to not purchase round or furnace pipe (or duct) and fittings, whether of sheet metal or fiberglass and including flexible fiberglass duct, or other products set forth in article VIII, section 3, of the aforesaid Standard Form of Union Agreement, manufactured by the employer-members of Associated Pipe, NIMA, or by other manufacturers who may pay their production employees wages less than the prevailing wage for comparable sheet metal fabrication as established under agreements between the Respondent and sheet metal fabricators, or between other local affiliates of Sheet Metal Workers' International Association, AFL–CIO (whether sheet metal workers' building and construction locals, production locals, or industrial locals), and sheet metal fabricators; or (2) to not purchase or use round pipe of a material other than metal, e.g., fiberglass, except where specified by the owner or his representative; or (3) to not use flexible connections except of prescribed lengths.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in these proceedings, I recommend that the Respondent, Sheet Metal Workers Union, Local 216, Sheet Metal Workers' International Association, AFL–CIO, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining, enforcing, or giving effect to article II, section 2, or article VIII, section 2 or 3, of the contract entered into by the Respondent and the Contractors and its employer-members on or about July 1, 1965, entitled "Standard Form of Union Agreement, Sheet Metal, Roofing, Ventilating and Air Conditioning Contracting Divisions of the Construction Industry," or the agreement entered into on or about November 3, 1966, supplemental thereto, entitled "Pipe and Fittings" or the further agreement entered into shortly thereafter restricting use of flexible connections, insofar as said agreements require the employer-members of the Contractors: (1) to not purchase round or furnace pipe (or duct) and fittings, whether of sheet metal or fiberglass and including flexible fiberglass duct, or other products set forth in article VIII, section 3, of the aforesaid Standard Form of Union Agreement, manufactured by the employer-members of Associated Pipe and Fitting Manufacturers, National Insulation Manufacturers Association, or any other manufacturers who may pay their production employees wages less than the prevailing wage for comparable sheet metal fabrication as established under agreements between the Respondent and sheet metal fabricators, or between other local affiliates of Sheet Metal Workers' International Association, AFL–CIO (whether sheet metal workers' building and construction locals, production locals, or industrial locals), and sheet metal fabricators; or (2) to not purchase or use round pipe of a material other than metal, e.g., fiberglass, except where specified by the owner or his representative; or (3) to not use flexible connections except of prescribed lengths.

(b) Executing, maintaining, enforcing, or giving effect to any other contract or agreement, expressed or implied, whereby the Contractors or its employer-members cease or refrain, or agree to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in any of the products of the employer-members of Associated Pipe and Fitting Manufacturers, National Insulation Manufacturers Association, or any other employer, or from doing business with any other person.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at the Respondent's business offices and meeting halls, copies of the attached notice marked "Appendix."[31] Copies of said notice, on forms provided by the Regional Director for Region 20, after

[31] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the aforesaid Regional Director for forwarding to the Contractors and its employer-members for posting by them, if they are willing, in all locations where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[32]

[32] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL MEMBERS

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT execute, maintain, give effect to, or enforce any contract or agreement, express or implied, with Sheet Metal, Heating and Air Conditioning Contractors of Alameda and Contra Costa Counties, or its employer-members, whereby such employers cease or refrain, or agree to cease or refrain, from doing business with Associated Pipe and Fitting Manufacturers, National Insulation Manufacturers Association, or any other employer or person, in violation of Section 8(e) of the Act.

WE WILL NOT enforce, maintain, or give effect to article II, section 2, or article VIII, section 2 or 3, of the contract entered into by this Union, on or about July 1, 1965, with Sheet Metal, Heating, and Air Conditioning Contractors of Alameda and Contra Costa Counties and its employer-members entitled "Standard Form of Union Agreement, Sheet Metal, Roofing, Ventilating and Air Conditioning Contracting Divisions of the Construction Industry," or the supplemental agreement entered into on or about November 3, 1966, entitled "Pipe and Fittings," or the agreement entered into shortly thereafter restricting use of flexible connections, insofar as said agreements require the employer-members of said association: (1) to not purchase round or furnace pipe (or duct) and fittings, whether of sheet metal or fiberglass, and including flexible fiberglass duct, or other products set forth in article VIII, section 3, of the aforesaid Standard Form of Union Agreement, manufactured by the employer-members of Associated Pipe and Fitting Manufacturers, National Insulation Manufacturers Association, or by other manufacturers who may pay their production employees wages less than prevailing wages for comparable sheet metal fabrication as established under agreements between this Union and sheet metal fabricators, or between other local affiliates of Sheet Metal Workers' International Association, AFL–CIO (whether sheet metal workers' building and construction locals, production locals, or industrial locals), and sheet metal fabricators; or (2) to not purchase or use round pipe of a material other than metal, e.g., fiberglass, except where specified by the owner or his representative; or (3) to not use flexible connections except at prescribed lengths.

SHEET METAL WORKERS UNION, LOCAL 216, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL–CIO
(Labor Organization)

Dated By

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone 556–3197.